No. 06-828

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In The
Supreme Court of the United States

CATHY LYNN HENDERSON,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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The Brief in Opposition ("*Opp.*") is both predictable and unremarkable. Respondent offers little in defense of the Fifth Circuit's reliance upon *Texas v. Cobb*, 532 U.S. 162 (2001), and instead spares no effort in pummeling petitioner's appointed counsel for alleged procedural oversights that, in the context of this case, simply do not implicate *genuine* concerns about comity or finality.

1. *Texas v. Cobb* Should Not Be Extended To This Case

To recapitulate, the chief and compelling reasons why certiorari should be granted are (1) to sweep from the books the Fifth Circuit's unsupportable extension of *Cobb*, lest it infect both this case and post-*Cobb* jurisprudence generally (*Pet.*, at 14-23); so that (2) the district court may then consider whether the *ex post* "exception" to the attorney client privilege crafted in *Henderson v. State*, 962 S.W.2d 544, 557-59 (Tex. Ct. Crim. App. 1997) is contrary to or an unreasonable application of federal law (28 U.S.C. § 2254(d)(1)), as determined by this Court in *Fisher v. United States*, 425 U.S. 391(1976) and its progeny. *Pet.*, at 23-28.

This gateway office of the petition is important because the "exception" – especially if coupled with *Cobb* – is bound to curtail suspects from seeking the full measure of legal advice, and is bound to cause attorneys to hesitate or refuse to provide assistance if faced with even the possibility of being forced to testify against the client about any crime, charged or uncharged, the client may have disclosed. Nothing in *Cobb* remotely supports forcing attorneys to confront "the dilemma . . . of either advising the client without knowledge of *all* the relevant facts, or of

obtaining the necessary information from the client[] . . . at the risk of having to divulge it to an adverse party."[1]

Respondent's discussion of *Cobb* (*Opp.*, at 17-25) therefore is little more than a recycling of the reasoning of the courts below, devoid of any anchor in the concerns that informed this Court's decision. For example, the repeated point that "there can be no right of effective assistance of counsel" until and unless formal charges have been preferred (*e.g.*, *Opp.*, at 20) is belied by *Cobb's* square reliance upon *Miranda v. Arizona*, 384 U.S. 436 (1966) as the bulwark protection of the rights of uncharged suspects. *Cobb*, 532 U.S. at 171-72.

Respondent likewise fails to offer any principled justification for the patent inequity of extending *Cobb* to circumstances "where Henderson was at the time of the allegedly problematic conduct charged with kidnapping the same child she was eventually [i.e., the very next day] charged with murdering" (*Pet. App.* 122a). Petitioner was arrested on state and federal kidnapping charges (*Opp.*, at 7). An element each statute is an unlawful abduction, plus "interstate transportation" under the federal statute.[2] All else aside, her *Miranda*-appointed attorney *had* to arm himself with *all* the facts simply to deal with the statutory elements of the kidnapping charges themselves. When petitioner told him that the baby died in her Texas home, and disclosed the location of the Texas gravesite, counsel

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[1] Brief *Amici Curiae* on Behalf of the American College of Trial Lawyers, *et al.* in *Upjohn Corp. v. United States*, No. 79-886 (June 1980), at 17. All emphasis in materials quoted in this Reply Brief has been supplied.

[2] See TEX. PENAL CODE § 20.03(a) (*Pet. App.* 131a), and 18 U.S.C. § 1201.

knew that the kidnapping charges could not be proved. But he also knew that petitioner had information pertinent to the yet-uncharged crime of murder, and that his *Miranda* obligation extended to protecting her rights without regard to whether any particular crime had or had not been charged. Counsel therefore was on the horns of the very dilemma noted *ante*, p. 2.

It makes no sense to subvert *Miranda* by extending *Cobb* here, thereby conferring upon the State a license to compel petitioner's successor attorney to reveal confidences that led the State to charge petitioner with murder the very next day. This approach simply cannot be squared with the principle that attorney-client confidences rest upon "the need for the advocate and counselor to know *all* that relates to the client's reasons for seeking representation if the professional mission is to be carried out," *Trammel v. United States*, 445 U.S. 40, 51 (1980).

Respondent nevertheless argues that *Cobb* would be "meaningless" if not applied here (*Opp.*, at 22), but that is not accurate at all. In *Cobb*, the Court declined the State's invitation to overrule *Michigan v. Jackson*, 475 U.S. 625 (1986),[3] and simply held that *Jackson's* higher standard of "waiver" of the right to counsel is confined to post-indictment interrogation, and does not displace *Miranda* during pre-indictment interrogation. See *Pet.*, at 15-20. Neither that holding nor its jurisprudential underpinnings will be "meaningless" if the decision below is reversed, for petitioner's case has noting to do with *any* waiver of the

[3] See Pet. Br. in *Cobb*, 2000 U.S. S. Ct. Briefs LEXIS 431, at **18 ("*Jackson* is a dead letter and should be overruled.")

right to counsel during police interrogation on any crime, charged or uncharged.

2. Respondent's Waiver and Failure to Exhaust Arguments Are Not Well-Taken

Finding no refuge in *Cobb* itself, respondent asserts procedural defaults by petitioner's State-provided counsel ("waiver" and "failure to exhaust") as reasons for denying the writ. These arguments are not impressive because they do not even begin to implicate any genuine State interests in comity or finality.

It is well to remember that petitioner's arrest, trial, direct appeal, prior certiorari petition and the filing of her state habeas petition *all* took place before *Cobb* was decided, and thus came during an era in which the Texas courts (and the Fifth Circuit as well) saw no need to draw fine distinctions between the Fifth and Sixth Amendments as sources of the right to counsel. *Pet. App.* 14a. Moreover, the distinction drawn in *Cobb* goes only to the *Miranda* versus *Jackson* standards of waiver of the right to counsel during police interrogation, a distinction having no significance or application here at all.

Viewed in this light, respondent's argument that petitioner is out of court because her attorneys "waived" petitioner's Fifth Amendment rights (*Opp.*, at 13-15) has nothing to recommend it. Acknowledging as he must that petitioner had a right of counsel, under *Miranda*, even as to the uncharged crime of capital murder, and that "certainly, most defendants would want to maintain a confidential relationship" with their attorneys, respondent nevertheless faults petitioner solely because her appointed counsel should have included the words "Fifth Amendment"

in the federal habeas petition (*Opp.*, at 22). But this is not "waiver" in any sense of a deliberate choice of strategy, for at bottom, respondent is really saying no more than that counsel "erred" in failing to move for leave to amend the petition when the omission of reference to the fifth amendment was called to attention while the case was still before the district court.

Principles of liberality that inform motions to amend under F.R.CIV.P. 15(a) – "leave *shall* be freely given when justice so requires" – demonstrate that respondent cannot suffer any genuine prejudice if the Fifth Circuit's reliance upon *Cobb* is reversed, and the case then goes forward with due attention to Fifth and Sixth Amendment principles. This is particularly evident in light of *Patterson's* observation that, when the State attempts to wrest incriminating evidence from a suspect, charged or uncharged, the focus is upon the role of the lawyer's role in protecting her client, "rather than the particular constitutional guarantee that gives rise to the right of counsel." *Patterson v. Illinois*, 487 U.S. 285, 299 n. 6 (1988). *Pet.*, at 19-20. Respondent's "waiver" argument therefore stands on ceremony purely, and should not be credited by this Court.

Similar considerations also undermine respondent's argument that review should be denied because petitioner's appointed counsel failed to exhaust *one* of her claims in her state habeas petition. (*Opp.*, at 15-17). To begin with, each of petitioner's *Cobb*-implicated claims involving inadequate assistance of her counsel ("IAC") regarding seizure of the map *was* exhausted, and *will be* adjudicated if the decision below is reversed, for the Fifth Circuit rejected each of these *exhausted* claims solely on the basis of *Cobb*. *Pet. App.* 12a-18a. If the district court

thereby is permitted to adjudicate the merits of these *exhausted* IAC claims, respondent will at that point doubtless argue that counsel's errors were harmless in light of the "exception" crafted in *Henderson v. State, supra*. This will require the district court to consider the validity of the exception in light of the law clearly established by this Court in *Fisher v. United States, supra*, and the other authorities cited at pages 23-28 of the Petition. Therefore, even on the present record, exhaustion principles will not prevent the district court from adjudicating the issues that respondent would prefer to avoid.

In part because of the foregoing, and also for prudential reasons, the petition does not seek review by this Court – at this stage of the proceedings – of the alternate basis for the district court's holding that *one* of petitioner's *Cobb*-implicated claims had not been exhausted in her state habeas petition.[4] But if the case returns to the district court because *Cobb* is no bar, the district court's prior determination of non-exhaustion will then be – at most – no more than an interlocutory order of partial summary judgment, which has no preclusive effect and may be modified or withdrawn at any time prior to final judgment. 10B C. A. Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE § 2737, at 323 (West, 1998); Wm. Schwarzer, *et al.*, FEDERAL CIVIL PROCEDURE BEFORE TRIAL § 14:36, at 14-52 Rutter, 2006). That is precisely why we said that "if the decision below is reversed, there will be time enough

[4] See *Pet. App.* 72a, retroactively applying *Baldwin v. Reese*, 541 U.S. 27 (2004) to the state habeas petition's failure to challenge with precision "the trial judge's error in compelling [attorney] Byington to produce the map."

for the district court to reconsider" its prior ruling on exhaustion. *Pet.*, at 3, n. 3.

In this setting, the district court will be free to consider whether its prior ruling, based as it was only upon petitioner's state habeas petition, should be reexamined by focusing upon her direct appeal, which is an entirely adequate, alternate means of exhaustion under *Myers v. Collins*, 919 F.2d 1074, 1076 (5th Cir. 1990). Respondent admits that "on *direct appeal*, Henderson *challenged* the trial court's *order* compelling production," but he nevertheless argues that this challenge "simply asserted that the ruling improperly infringed upon the attorney-client privilege" devoid of constitutional significance. *Opp.*, at 16, n. 13. But under *Fisher* itself – the very case the CCA cited to support its "exception" to the attorney client privilege – the constitutional significance is altogether evident because the attorney is "*not bound to produce*" evidence "*that the client himself would be privileged from produc[ing] . . . as exempt from self-incrimination,*" *Fisher v. United States*, 425 U.S. at 404. No legitimate State interest will be invaded or frustrated if the district court examines the CCA's own misplaced reliance upon *Fisher*, and on the exhaustion question, chooses to "gracefully and good-naturedly surrender[] former views to a better considered position," *McGrath v. Kristensen*, 340 U.S. 162, 177-78 (1950) (Jackson, J., concurring).[5]

[5] The Fifth Circuit's reliance upon appointed counsel's concession during oral argument (*Pet. App.* 11a) is not pertinent to exhaustion via direct appeal because (1) the concession was confined to her counsel's own efforts on the state habeas petition, and (2) judicial admissions are in any event binding only as to matters of fact, not legal theories or conclusions. *See, e.g., New York State National Organization for Women v. Terry*, 159 F.3d 86, 97 n. 7 (2nd Cir. 1998); *McCaskill v. SCI*

(Continued on following page)

It also needs to be said that respondent's hectoring of appointed counsel is not appropriate, for any wounds the State might suffer if petitioner is permitted a decent chance to overcome her counsel's alleged errors would be wounds of self-infliction purely. It is a matter of judicial notice that there is great concern about the shortfall in the quality and resources of representation that states provide to capital defendants, and nowhere is this concern greater than that in Texas.[6] The provision of competent trial and appellate counsel is an obligation secured by *Gideon v. Wainwright*, 372 U.S. 335 (1963), and in Texas capital cases, this obligation extends to state and federal habeas as well.[7] Any claim that State-provided counsel committed material error is at once an admission that the State failed to provide the competent counsel that the law requires.

In response to the growing body of criticism that the State is not fulfilling these obligations, the Texas CCA has just adopted a new rule designed to improve the quality of appointed counsel.[8] That may bode well for the future, but

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Management Corp., 298 F.3d 677, 681-83 (7th Cir. 2002) (concurring opinion of Rovner, J., collecting the authorities).

[6] *See, e.g.*, C. Lindell, *Sloppy Lawyers Failing Clients on Death Row: For 11 Years, Top Texas Court Ignored Shoddy Work as 273 People were Executed*, THE AUSTIN STATESMAN-AMERICAN, October 29-30, 2006.

[7] *See* TEX. CODE CRIM. PROC. art. 11.071 § 2(a) (an applicant for habeas corpus relief in a capital case "shall be represented by competent counsel." Upon denial of the writ, appointed counsel "shall . . . move to be appointed as counsel in federal habeas review under 21 U.S.C. § 848(q)," (*id.*, § 2(e), for all of which the State shall reimburse the county in an amount that "may not exceed $25,000.00." *Id.*, § 2A(a)).

[8] *See* Amended Rules for the Appointment of Attorneys as Counsel under Article 11.071(d) Sec. 2(d), Texas Code of Criminal Procedure (CCA, December 11, 2006), available at http://www.cca.courts.state.tx.us/rules/rule4-appt-of-attys-final-121106rev.pdf (visited January 23, 2007).

petitioner is one of many still in the pipeline under the *ancien régime*, and these defendants have little choice but to look to the *pro bono* resources of the private bar as a means to help balance the scales. Cutting capital defendants just a modicum of slack – if it even be that – on the procedural defaults of prior counsel will improve the quality of justice at no expense to genuine State interests.

3. Reply on Question 3

Finally, on Question 3 of the petition (IAC on the direct appeal) we reply only that (1) respondent's characterization of the trial judge's remarks merely his "personal belief" – a term normally employed only when "belief" is based upon matters *dehors* the record – is unavailing, for the judge was stating his assessment of and conclusion from the evidence of record at the hearing; and (2) had the CCA been aware of this, it is reasonably probable that it would have given better and thoughtful consideration of both the grounds for its "exception" and its failure to give due attention to what *Fisher* squarely holds. For all the reasons discussed, and particularly in a capital case, "a probability sufficient to undermine confidence in the outcome" is present here. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

CONCLUSION

The petition for a writ of certiorari should be granted

Dated: February 5, 2007

Respectfully submitted,

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